

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES ex rel. THOMAS MUNGO,

Petitioner,

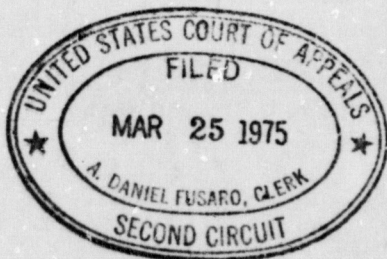
v.

J. EDWIN LAVALLEE, Superintendent of
Clinton Correctional Facility.

Respondent.

-----X

APPENDIX FOR PETITIONER THOMAS MUNGO



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PAGINATION AS IN ORIGINAL COPY

Minutes of Pre-Trial Hearing
on Motion to Suppress
(10/18/67)

Return of Verdict
to Honorable Court
488-7410

SUPREME COURT: COUNTY OF KINGS

CRIMINAL TERM: PART I-A

-----Y
THE PEOPLE OF THE STATE OF NEW YORK

- against -

WALTER JOHNSON, THOMAS MUNGO, and
ROBERT D'AMBERA,
Defendants
-----X

NOTION TO
SUPPRESS
HEARING

(Ind. 1095 and 1096) of 1967.

October 18, 1967

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B e f o r e :

HON. JULIUS HELFAND, Justice

A p p e a r a n c e s :

MARTHA PRINCE, Asst. D.A.,
Kings County,
For the People

FREDERICK D. KRANZ, Esq.,
Attorney for defendant Thomas Mungo

BERNARD JAY COVEN, Esq.,
Attorney for defendants Johnson and D'Ambra.

EDNA W. HECHT, C.S.R.,
Official Court Reporter

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THE COURT: There are three motions, as I see it.

MRS. PRINCE: They are all suppression motions, your Honor.

THE COURT: Are they based on the same set of facts?

MRS. PRINCE: Yes, they are.

MR. COVEN: Two separate indictments.

THE COURT: Indictment 1095 and indictment 1096. For the purpose of this hearing can the three motions be consolidated so they may be heard together?

MR. COVEN: All right, your Honor.

THE COURT: As they affect both indictments.

MR. COVEN: Yes.

THE COURT: Very well. Stipulated by both sides?

MR. KRANZ: Yes.

THE COURT: Motions respecting indictments 1095 and 1096 of '67 affecting the defendants Mungo, Johnson, and D'Ambra will be heard together with respect to both indictments, and testimony will be taken as against all three

defendants as if it were one motion consolidated for the purpose of this hearing.

THE COURT: May I ask counsel, what items are there that you are seeking to suppress in the consolidated motion?

MR. KRANZ: Two guns, your Honor, and keys.

THE COURT: Do you agree with that,

Mr. Coven?

MR. COVEN: Yes, your Honor.

PATROLMAN EDWARD OBAROWSKI,
Shield 19102, assigned to the 62nd Precinct, being
called as a witness on behalf of the People, being
duly sworn, testified as follows:

DIRECT EXAMINATION BY MRS. PRINCE:

Q Officer, on January 14 of 1967 were you associated with the Police Department?

A Yes, I was.

Q And were you on duty that day?

A Yes, I was.

Q What was your tour of duty?

A My tour of duty was 8:00 a.m. to 4:00 p.m.

THE COURT: Speak up louder, please, so that both lawyers and the defendants may hear what you say.

A Yes, sir. Tour was 8:00 a.m. to 4:00 p.m.

Q What was your particular assignment for the day?

A I was assigned to R.M.P. 1137, sergeant's car, covering the east half of the 62nd precinct.

Q At about 9:30 a.m. did you receive a telephone communication on the radio?

MR. COVEN: Objection, Judge.

MR. KRANZ: Leading. Objection.

THE COURT: Overruled.

A Yes.

THE COURT: There is no jury here. Don't

worry about leading questions. Let me decide.

A An alarm was transmitted over the police radio stating that --

MR. COVEN: I object to what the alarm stated, your Honor.

THE COURT: Overruled.

MR. COVEN: May we have a voir dire on that?

THE COURT: No, you may not. You have an exception.

Proceed.

MR. KRANZ: I join in the objection.

MR. COVEN: May we have a voir dire on what the alarm stated?

THE COURT: You may not. You may cross-examine him on it. This is a hearing, not a trial.

Q Would you tell us what the radio alarm indicated or stated?

A It stated that in connection with a high-jacking of a U. P. S. truck --

THE COURT: Don't use initials.

A (cont'g) United Parcel Service Truck in the 66th Precinct, that the perpetrators were supposedly leaving the scene, or seen leaving the scene in a 1966 Plymouth, color blue, registration 6 Z 7514.

THE COURT: Where is the 66th Precinct? Is that what you mentioned?

THE WITNESS: That is where the initial incident took place.

THE COURT: Where is it?

THE WITNESS: It is at 15th Avenue and 59th Street, I believe, your Honor.

THE COURT: All right, proceed.

Q Did the alarm, in any way, indicate where this truck was left or stolen from?

A It was left -- it was taken; the alarm stated that it was taken in the 66th Precinct, and was left in the 64th

Precinct, approximately 71st Street and Fort Hamilton Parkway.

Q Did you receive more than one communication with regard to a stolen United Parcel truck?

MR. KRANZ: Objection.

MR. COVEN: Objection.

THE COURT: Overruled.

A Only the second in the fact that they had announced, had broadcast the fact that after the truck had been dropped the perpetrators were seen entering a car, the same registration as I previously said, and leaving the scene in that car.

Q Did they indicate how many perpetrators there were?

A Three at the time.

Q And the description of the car was given? Was the description of the car given at that time?

A It was a blue sedan.

Q Was a license plate number given?

A Yes.

Q What was the license plate as far as you recall?

A As far as I recall it was 6 Z 7514.

THE COURT: About what time was it that you received this alarm?

THE WITNESS: It was a little before ten,

about ten to ten.

THE COURT: In the morning?

THE WITNESS: Yes, sir.

Q Where were you located at that time?

A At that time I happened to be at Avenue P and McDonald Avenue.

Q Now, did there come a time when you say --

THE COURT: What did you proceed to do after you got the alarm?

THE WITNESS: I was on radio motor patrol. I was cruising the precinct, and I happened to be in the area of West 11th Street and Avenue W when I observed the car proceeding in the opposite direction from me. I noticed the plate number. I turned my car around. I followed the car to Avenue U and West 8th Street.

THE COURT: About how far was it from where you had originally received the alarm, approximately?

THE WITNESS: Two to three miles.

Q What was the color of the car?

A Blue.

Q How many occupants were there at the time?

A Three.

Q What did you do upon seeing this automobile?

A I chased it to Avenue U and West 8th Street.

THE COURT: What do you mean you chased it?
Tell us exactly what you did.

THE WITNESS: I made a U turn. The vehicle was proceeding in the opposite direction from which I was going. I made a U turn with my vehicle. I followed it down to Avenue U and West 8th Street where I was able to catch up to it; and at that time I stopped it at that corner and proceeded to place the defendants under arrest.

THE COURT: What about the license number?
What was there about that that attracted your attention, if it did?

THE WITNESS: On coming I noticed the plate number.

THE COURT: Was it similar to the one you received the information on in the alarm?

THE WITNESS: Yes, your Honor.

Q What did you do thereafter?

A Well, at Avenue U and West 8th Street, where I apprehended the vehicle, I took the defendants out of the vehicle and I placed them under arrest.

Q At that time did you feel that they were the three people sought by the police?

MR. COVEN: Objection.

MR. KRANZ: Objection to the form.

THE COURT: Reframe the question.

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Let me put it this way: Based on the information you received in the alarm did you have reason to believe that these were the perpetrators of the alleged high-jacking?

THE WITNESS: Yes, your Honor.

MR. COVEN: Your Honor, I respectfully object to your Honor's participation in a crucial issue of this case directing that attention to the witness.

THE COURT: Your objection is overruled. You have an exception.

Q Did you proceed to make a search of the persons, or of the car at that time?

A At the time I frisked the persons and I searched the car.

THE COURT: Do you see any of these persons here in court today?

THE WITNESS: Yes, your Honor.

THE COURT: Who are they?

THE WITNESS: Defendants Johnson, Mungo, and

D'Ambra.

THE COURT: Point out which is Johnson?

THE WITNESS: First one, Walter Johnson, light jacket on; Thomas Mungo, sitting with the grey suit on.

THE COURT: In the middle?

THE WITNESS: In the middle, and Bobby D'Ambra, right side, blue shirt, grey jacket.

Q You say that you had frisked the defendants?

A Yes.

Q And did you then make a search of the car?

A Yes, I did.

Q What, if anything, did you find?

A I found underneath the seat of the driver, Thomas Mungo, one 22 caliber 8 shot revolver, make R.S.T. black metal, serial number 461566; and under the right side, the passenger side, one black metal 32 caliber automatic Savage 8 shot, both guns fully loaded. Serial number of the Savage apparently filed away.

Q Do you have the guns and the shells in court this morning?

A Yes, I do.

MRS. PRINCE: Your Honor, may we treat them

both as one exhibit, or do you want them separately?

THE COURT: If there is no objection by counsel, and for the purpose of this hearing only, I will permit that they be deemed marked People's Exhibit 1 in evidence, both guns, if there is no objection.

MR. KRANZ: No objection.

MRS. PRINCE: Both guns and the shells.

MR. COVEN: For the purpose of this hearing no objection.

THE COURT: For the purpose of this hearing the two guns, which have been identified and described by the witness, are deemed marked People's Exhibit 1 in evidence.

MRS. PRINCE: And the shells, your Honor.

THE COURT: And the shells accompanying the guns; in other words, the whole package, two guns and the shells are deemed marked in evidence as People's Exhibit 1.

Q. After you found these guns what did you then do?

A Well, we had placed the defendants under arrest.

THE COURT: You say "we". Was there another officer with you?

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THE WITNESS: Yes, Sergeant Linanne, my partner.

THE COURT: In the car with you from the time you got the alarm?

THE WITNESS: Yes.

THE COURT: Until the incidents that you have described?

THE WITNESS: Yes. We placed them under arrest and we took them into the station house.

Q At the station house was a search of the person of the defendants made?

A Yes, there was.

THE COURT: All three?

THE WITNESS: Of all three.

Q What, if anything, did you find?

A In the pocket, right pocket of the defendant D'Ambra was two keys later identified as telephone box keys, coin box keys.

Q Officer, do the keys have any special designation, or any special markings on them?

A Yes, they are both serial numbered; first key 47647A, second key U 08809.

MRS. PRINCE: I should like to offer both of these keys as People's Exhibit 2 for purposes

of this hearing.

THE COURT: Under the same stipulation, and for the purpose of this hearing the two keys, which have been identified by serial number, will be deemed marked People's Exhibit 2 in evidence.

MRS. PRINCE: I have no further questions.

CROSS EXAMINATION BY MR. KRANE:

Q Officer, you say you received an alarm over the police radio; is that right?

A Yes.

Q Did you make a notation of that alarm in your memo book?

A Not at the time. I marked it on a piece of scratch paper.

Q Do you have that scratch paper with you?

A No, I don't.

Q Officer, you say that over the radio they gave the license plate of the automobile; is that right?

A Yes.

Q What is the license plate of that car?

THE COURT: Did you later transfer the information into your book?

THE WITNESS: Yes, I did later on. I

transferred the information as being plate number 6 Z 7514.

Q 6 Z 7514; is that right?

A Yes.

Q Now, officer, there came a time when you approached the vehicle that you say the three defendants were in; is that right?

A Yes.

Q At that time were they stopped at a signal light?

A They were just stopping at a signal light.

Q What, if anything, did you do at that time?

A Exited from my car and apprehended them.

Q You got out of your car?

A Yes.

Q When you got out of the car did you have your gun drawn?

A No, I had my hand on my gun.

Q You had a sergeant with you?

A Yes.

Q Did he have his gun drawn?

A I don't remember.

Q When you went over to the car did you have a conversation with any of the defendants?

A Yes. I just asked them to step out of the car.

Q Who did you speak to?

A The one driving the car on my side, Thomas Munge.

Q Did he get out of the car?

A Yes, sir.

Q Did the sergeant say anything to any of the persons in the automobile?

A Yes, he told them to hold it up.

THE COURT: To what?

THE WITNESS: To stop, wait.

Q Did he order them out of the car?

A He ordered the one out of the car, Walter Johnson. The other passenger, who was sitting in the back, was D'Ambra, who was exiting the car at the time.

Q When you told Munge to get out of the car what were your exact words?

A Verbatim, I don't know.

Q Officer, you didn't use the defendant's name, did you?

A No.

Q You just said, "Get out of the car."

A Yes.

Q And you directed it to the three defendants generally; isn't that right?

A Yes.

Q You say, officer, on direct examination, that you placed the defendants under arrest; is that right?

A Yea.

Q And that was before you frisked them, before you searched the car; is that right?

A Yea.

Q What did you place them under arrest for?

A At the time I believed that they were, or they had been the ones involved with the high-jacking of a truck, in other words, a larceny.

MR. KRANZ: I object to it and ask the answer be stricken as not responsive.

THE COURT: Your motion to strike as not being responsive is denied. You asked him specifically what he placed them under arrest for, and he said he had reason to believe they were the perpetrators of the high-jacking, the larceny. That is what he said.

Q Officer, how long have you been a policeman?

A Six and a half years.

Q You know what a larceny is, don't you?

A Yea.

Q And you know what high-jacking is?

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A Roughly, yes.

Q Now, is high-jacking designated a crime in the penal law, if you know?

A Do I know? No, I don't know.

Q Officer, you say you placed them under arrest. Did you place them under arrest for a crime?

A As far as my knowledge is concerned, yes.

Q What crime did you place them under arrest for?

A At that time high-jacking.

Q High-jacking. Do you know --

THE COURT: I am not going to permit a discussion as to the technical meaning of high-jacking with this officer. He says a larceny.

High-jacking of a truck, do you understand that to mean the stealing of a truck?

THE WITNESS: The stealing of a truck or its contents.

THE COURT: Right.

Q Officer, did you prepare an affidavit or complaint in this case?

A I believe so.

Q In your complaint did you ever charge these defendants with the high-jacking or the larceny of any truck?

A

Q You never did?

A No.

Q And officer, after they got out of the car you searched the car; is that right?

A Yes.

Q And this was after you told them they were under arrest. And under the seat you say you found two guns?

A Yes.

Q Then you placed them under arrest for what?

A For the violation of the guns also.

Q Then did you take the automobile to the station house?

A Yes, I did.

Q And then you searched the automobile further?

A Yes, I did.

Q But at no time did you ever charge them with the larceny of a truck?

A No.

THE COURT: Where are the indictments in this case? Do you have the affidavit or complaint?

(Handed to the Court.)

Reading the affidavit, Mr. Krenz, practically blueprints the testimony of this defendant as to

what happened on that day.

MR. KRAVZ: You mean the officer?

THE COURT: I mean the officer, how he got the call, where the truck was missing from; all the information that he testified to is set forth in detail in the affidavit. He doesn't have to decide what crime that is. It is obvious from the facts that he was in possession of the information which he now testified to.

Q Officer, this is a copy of the complaint in the matter that is now before the court, the hearing?

A Yes.

Q Is this the complaint that you prepared, signed and swore to?

THE COURT: Is that your signature?

THE WITNESS: There is no signature on this.

THE COURT: Where is the original?

Anyhow, is that the copy of the complaint?

THE WITNESS: Yes, it is.

THE COURT: You don't have to read every word of it. By looking at it you would know.

THE WITNESS: Yes.

Q Officer, I ask you to look at the third paragraph

from the bottom.

THE COURT: The complaint speaks for itself. It is now here. It is a court report. I have read it. There is no point unless there is some specific matter that you want to direct his attention to.

Q Officer, will you direct your attention to the license plate that you have in that complaint?

A Yes.

Q Will you read it to the Court?

A 6 Z 7154.

Q You just read from your notes that you say you transcribed that the license plate of the car was 6 Z 7514.

A According to my memo book?

Q Yes or no.

A Yes.

Q That is different from what is in the complaint?

A Yes.

Q Is it a fact, officer, that the origin of the call was from an unknown person?

THE COURT: He doesn't know. He says from police headquarters over a radio.

MR. COVEN: I object to your Honor's

furnishing the witness with the answers. As a matter of fact, I object to the entire prejudicial manner in which your Honor is handling this hearing.

THE COURT: Your objection is overruled, counsellor. You have an exception.

Q Officer --

THE COURT: Just a minute.

Mr. Kranz, his testimony was that this was a police call in the regular course of the business of the department over a radio. He didn't say he got it from any particular person.

MR. KRANZ: If I may just pursue it for one moment?

THE COURT: Yes.

Q Officer, in the same paragraph where you have the license plate listed in the complaint I call your attention to the first sentence wherein you state, "A call was made to the 64th Precinct by an unknown person." Is that right?

A Yes.

Q So that who originated the call you don't know?

A No, I don't.

Q Did you ever learn his identity?

A No.

Q Officer, eventually when these defendants were booked in the 6th precinct -- withdrawn.

In what precinct were the defendants booked?

A 62nd Precinct.

Q Eventually when these defendants were booked in the 62nd Precinct they were only charged with crimes involving property that was removed from the automobile, or the persons as a result of the search; is that right?

A Correct.

MR. KRANZ: I have no other questions at this time, your Honor.

CROSS-EXAMINATION BY MR. COVEN:

Q Officer, do you have your memorandum book with you?

A Yes, I do.

Q May I see it?

A Yes. (Handing)

Q When did you make the entries in this memorandum book?

A About an hour later, an hour and a half later.

Q And it was not subsequent to the hearing on April 4, 1967; is that right?

A I don't understand the question.

Q You were a witness to the hearing on April 4, 1967; is that correct?

A I believe so.

Q Were these entries made after April 4, 1967?

A No, they were made the same day.

Q The same day?

A Yes.

THE COURT: The same day. What day do you mean?

THE WITNESS: January 14; I would say it would be about one o'clock in the afternoon I made those entries.

Q Did you put a description of the alleged alarm in your memorandum book?

A Not that I remember.

Q Did you have occasion to refresh your recollection from your book before you took the stand?

A Yes, I did.

Q You read it?

A Yes.

Q Did you make any notation anywhere of the substance of that alleged alarm?

A At the time it was received from the police radio I put it on a piece of scrap paper.

Q Wrote a few words on a piece of scrap paper?

A A few letters, yes, plate number.

Q Just the plate number?

A Just the plate number.

Q That is all?

A That is all.

Q What did you do with the scratch paper?

A I don't know. I didn't save it. I don't have it.

Q What do you mean you don't know?

THE COURT: He says he did not save it.

Next question.

Q Did you destroy it?

A I probably did, yes.

Q Did you destroy it?

A Yes.

Q You realize as a police officer the necessity of accuracy of testimony; is that correct?

THE COURT: Don't lecture him. He is under oath. Next question please.

Q Is it true you chased the car? Is that a true statement?

A I followed it; I chased it, yes.

Q What speed was it going at?

A Roughly, I wouldn't know. I know that in making my

U turn and proceeding to follow the car I used a phrase "chased" in the fact that the car was already moving. I had to slow down and apprehend it. I had to cover a distance of about two blocks going at a speed of about 40 miles an hour.

Q That is your description of chase?

A Yes.

Q But it is a fact that the car stopped at a red light?

A Yes.

Q And at that moment you got out?

A Yes.

Q The car was proceeding at a normal rate of speed?

A Yes.

Q Legal rate of speed?

A Yes.

Q Any traffic offense committed by the car?

A No.

Q When you got out of your car you approached which side ?

A Driver's side.

Q What did you say?

A Step out of the car; get out of the car.

Q Anything else?

A Not that I remember.

Q Then what did you say immediately after they stepped out of the car?

A Immediately afterwards I don't remember what I said.

Q What was the next time you spoke to any of the defendants at that scene after you said, "Step out?"

A Placed them under arrest when we were taking them over to the radio car.

Q What did you say, sir?

A Just "Step out of the car; step out of the car." I don't remember exactly what.

Q What did you say in substance to any of the defendants?

THE COURT: He already answered; it is repetitious.

MR. COVEN: He hasn't given us an answer, Judge.

THE COURT: When I make a ruling, counsellor, just take an exception. Don't argue with me. And please step back. There is no jury to impress here.

Q Did you state --

THE COURT: He has already answered it.

Next question. He does not recall what else he said other than "Step out." Next question.

Q Did you state, in words or substance, "You are under arrest."

A Yes.

Q Did you give them a reason for their being under arrest?

A Yes.

Q What reason did you state?

A The reason that the occupants were wanted for a high-jacking of a U. S. truck.

Q Is that what you said?

THE COURT: The question is, did you say that to the defendants?

THE WITNESS: Not in essence, no; not in essence.

Q What did you say in essence?

A I told them they were being taken in for taking of the truck, or words to that effect.

Q Didn't you say to them, "You are being taken in for an investigation?"

A Yes, in connection --

Q In connection with an investigation; isn't that

correct?

A Yes.

Q And is it a fact that only after you reached the police station did you then inform them, you and your fellow officer, that they were under arrest?

A Yes.

Q That is a fact, isn't it, sir?

A Yes.

MR. KRAHZ: I didn't hear the answer.

THE WITNESS: Yes.

Q And did you tell them at the police station that they were then under arrest for the possession, which you stated unlawfully, of two revolvers?

A Yes.

Q At the police station you then made a search of the car; isn't that correct?

A Yes.

Q And at the police station where you had the defendant D'Ambra in custody, and while you had him in custody, you then investigated the keys; isn't that correct?

A Yes.

Q Did you have occasion to fill out a police form at the station house as to what charge was being made against these defendants?

A Yes.

Q What precisely did you then charge them with at that time? I withdrew the question.

Q Did you charge them with larceny of a truck?

A No, I charged them with criminally receiving, 1897, guns, and burglars tools, keys.

THE COURT: Criminally receiving what?

THE WITNESS: Just criminally receiving goods-- the empty boxes that were in the truck.

Q Do you recall that that charge was dismissed as without substance?

THE COURT: The question is stricken. You needn't answer it. It has no bearing on the issue here, whether that charge was dismissed or wasn't dismissed.

Q These boxes that you then made the charge, they were found after you brought the defendants into the station house and while you were making an investigation?

A Yes, sir.

MR. COVEN: I have no further questions.

THE COURT: Anything else of this witness.

MRS. PRINCE: Just one clarification.

RE-DIRECT EXAMINATION

BY MRS. PRINCE:

Q The time of the arrest, or the time you stopped

them on the street was approximately what time?

MR. COVEN: I object to that. He stated he arrested them at the police station. She is giving him an answer to a question on rebuttal, leading this witness to a contrary answer to what he has given under my cross-examination. The witness has testified the arrest was made at the station house.

THE COURT: Are you finished, counsellor?

MR. COVEN: Yes, your Honor.

THE COURT: I have told you before that if you have an objection, make it without making a long, extended speech. Now, do you have an objection to this question?

MR. COVEN: Yes, your Honor.

THE COURT: The objection is overruled.

A Approximately 10:30 a.m.

Q That was the time you saw them for the first time on the street; is that right?

A Yes.

MRS. PRINCE: Thank you. No further questions.

THE COURT: Step down. Next witness.

(The witness is excused.)

MR. COVEN: Would the officer remain in court with the book, your Honor?

THE COURT: Yes.

PATROL MAN JOHN D. SULLIVAN,
Shield number 11595, Communications Unit, Brooklyn,
called as a witness on behalf of the People, being
duly sworn, testified as follows:

DIRECT EXAMINATION BY MRS. PRINCE:

Q Officer, you say you are part of the Communications
Unit of Brooklyn?

A Yes, ma'm.

Q What specific job do you have?

A Clerical.

Q What do those duties entail?

A Keeping records, filing, and so forth.

Q Pursuant to my request did you bring certain
records into the Court?

A Yes, ma'm.

THE COURT: Are those records kept in the
regular course of business of the Police Department?

THE WITNESS: Yes, sir.

Q Would you tell us what those records are?

MR. COVEN: May we note for the record that
this witness was present in the courtroom while
the prior witness was testifying.

THE COURT: What difference does that make?
He brought records here. What difference does

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it make whether he was present or wasn't present?

MR. COVEN: Just for the record, Judge.

Q What are the records you now have in your possession?

A Form C.R.D. 'a.

Q What do those letters mean?

A They are used to receive and transmit information, Communications Unit, and record also.

Q Now, the first sheet of that paper that you have, does it have a time designation?

A Yes, ma'm. 9:38 a.m.

Q May I have that, please?

A (Handed)

MRS. PRINCE: (Handed to Mr. Krans and
Mr. Coven.)

I should like to offer this as People's
Exhibit 3.

THE COURT: It will be deemed marked People's
Exhibit 3 in evidence.

Q Would you read to us what information is revealed
on the face of that?

A It indicates that at 9:38 a.m. --

MR. COVEN: May I object respectfully, Judge.
It is now in evidence. It speaks for itself.

THE COURT: Do you want me to read it?

MR. COVEN: Yes. He is deciphering it.

I don't agree with his deciphering.

THE COURT: It is now in evidence.

Are these records in your handwriting?

THE WITNESS: No, sir.

THE COURT: Are you familiar with this type of record?

THE WITNESS: Yes.

THE COURT: You may read it.

A 9:38 a.m. January 14, 1967. From the 66th Precinct, Sergeant Caruso. Received by Patrolman Reilly. 69th Street and Fort Hamilton Parkway. See complainant re possible larceny of truck. Sergeant Caruso requested car 66 G, which is unavailable and call was given 66 D.

Q Is there a subsequent communication with reference to this particular matter?

A On the rear of the same slip, time stamped 9:56 a.m., January 14, 1967, 7416 United Parcel truck taken in front of 825 - 71st Street. Received from car 64 G, designation 2053, at 10:34.

Q Do you have a communication subsequent to that time?

A Yes, ma'am.

Q Would you tell us the time of that communication?

A [Time stamp 10:08 a.m., January 14, '67. From 66th Precinct, Sergeant Caruso. United Parcel truck, dark brown 1939 rocket, New York 145749 commercial. On the side truck number 7146, stolen from 68th Street and Fort Hamilton Parkway. Direction unknown. Transmitted by radio by operator number 37, Patrolman James McGovern.]

Q Is there anything written on the back of that?

A Yes, ma'am, [10:10 a.m., January 14, '67. R.M.P. 64 Q. Recovered at 825 - 71st Street unoccupied.]

THE COURT: It will be deemed marked People's Exhibit 4 in evidence.

MR. KRANZ: Your Honor, before the officer continues, may I question the officer with reference to these?

THE COURT: No, you may question him generally on cross-examination.

MR. KRANZ: Exception, your Honor.

MR. COVEN: May I have the same exception?

THE COURT: It will be deemed marked.

This is also kept in the regular course of business of the Police Department?

THE WITNESS: Yes.

THE COURT: You produced it here pursuant to the request of the District Attorney?

THE WITNESS: Yes.

MR. KRAVZ: I wanted to question him with reference to that.

THE COURT: There is no need for separate questioning. There is no jury here. There is no trial. Let's do it all at once in the interest of saving time and the convenience to the Court.

MR. KRAVZ: Exception, your Honor.

BY MRS. PRINCE:

Q Do you have another communication with reference to this matter?

A Yes, ma'am, I do.

Q What is the time of that?

A 10:13 a.m., January 14, 1967, from car 64 A. Perpetrators escaped in 6 Z 7154 New York, blue, four door vehicle, '66 Plymouth. Received by Patrolman James McGovern, assigned to radio.

Q Is there anything written on the back of that?

A Yes, ma'am. 10:21 a.m., January 14, '67. Indication '66 Plymouth by operator number 27, Frank Mollo.

MRS. PRINCE: I'd like to offer that as
People's Exhibit 5.

THE COURT: It will be deemed marked People's
Exhibit 5 in evidence.

Q Is there another communication with reference to
that?

A Yes, ma'm.

Q What is the time of this?

A [10:35 a.m., January 14, 1967. From R.M.P. 62,
Sergeant number 2. Indicates 62 B is also on scene. West
8th Street and Avenue U holding occupants of 6 Z 7154.
Received by operator number 37, Patrolman James McGovern.]

Q And is there a designation on the back?

A Yes, ma'm. [At 10:35 a.m., January 14, '67; 66
detectives, 64 detectives notified. 10:53 a.m., January 14,
64, signal 10383.]

THE COURT: What does that mean?

THE WITNESS: Subjects removed to station
house; 3 subjects.

MRS. PRINCE: I now offer that for People's
Exhibit 6.

THE COURT: It will be deemed marked in
evidence, People's Exhibit 6.

MRS. PRINCE: I have no further questions. You
may inquire.

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CROSS EXAMINATION**BY MR. KRANE:**

Q Officer, these forms that you have been reading from, they are designated C.R.D. 7; is that right?

A Yes.

Q Were all of these C.R.D. 7's prepared by the same person?

A No, sir.

Q And where are these reports kept?

A The original in our record room, 485 Bergen Street, fifth floor.

Q The originals in the record room?

A Yes, sir.

Q Now, are these the original or duplicates?

A These are originals and duplicates.

Q Pardon?

A These are originals.

Q Original and duplicates?

A Originals I got there. I'd have to look at them and see. (Handed to witness.)

These are all originals.

Q Pardon?

A They are all originals.

Q Who is in charge of the custody of these C.R.D. 7's?

A I am.

Q And how long have you been in charge of them?

A Two and a half years.

Q I notice, officer, that some of them are written in pencil and one is written in ink.

A The one in ink is on a turret position. The calls are received from the public and precincts originally for transmission to radio, or whatever equipment may be needed.

Q Officer, you say that these forms are kept at the Communications Bureau of the 78th Precinct?

A Yes.

Q How are they filed?

A Each day's work is filed separately in a big bundle.

Q And where are they left or kept?

A In a locked record room on the fifth floor.

Q And how many keys are there for this record room?

A One.

Q Now, at what point are these -- withdrawn.

Are these delivered to you or do you pick them up?

A They are delivered to me.

Q Who delivers them to you?

A The radio man and the turret man. Each day's work is handed to me and bundled up and filed away.

Q At the end of the day?

A Each morning, the following morning.

Q Is Caruso one of the officers who made these notations?

A That is a sergeant at 66.

Q Can you tell me who made these notations on the C.R.D. 7's?

A Yes, sir. Number 37. That is Patrolman James McGovern.

Q McGovern, is he still employed by the Police Department?

A Yes, sir. McGovern again, McGovern, McGovern, 27 is Patrolman Frank Mollo. And 22 is Patrolman Edward Oronachan.

Q Now, are these officers still members of the Police Department?

A Yes, sir.

Q Do these officers deliver these forms to you, or are they delivered to you by another person?

A They are left in a drawer with the day's work bundles; and I come in the following morning and pick up the previous day's work. Included in there is turret work, or other pertinent work, and file them together.

Q This drawer that they are in, this drawer isn't locked?

A No, sir.

THE COURT: I am not going to permit any further questioning along this line at this hearing. You have gone far enough now. He testified that these are kept in the regular course of the business of the Police Department, described it; and I will permit no further questioning on this point beyond what you have already developed.

MR. KRANZ: This last question.

THE COURT: No more. Something new now, Mr. Kranz, from this officer, something brand new.

MR. KRANZ: Your Honor --

THE COURT: I said something new, Mr. Kranz, from this officer. You finished that line of questioning.

MR. KRANZ: Exception.

Q Officer, I note on this C.R.D. 7 dated January 14, 1967, 10:35 a.m. Holding occupants. Is that right?

A Yes, sir.

Q Now, that doesn't say what the occupants are being held for, does it?

A No, sir.

Q Isn't the ordinary course of business of the Police Department to place on these C.R.D. 7's what the person

is being held for if he is under arrest?

THE COURT: If you know.

THE WITNESS: I know how the system works, our operations. Shall I explain that?

THE COURT: The question is a very simple one.

Is it usual to put on there, in addition to the fact they are being held, what they are actually being held for?

THE WITNESS: Not on each individual slip, no.

Q Where is it placed?

A All these slips are kept in sequence, clipped together; and as each information comes in they are added to, and when the thing is terminated they are all filed together.

Q Is there a form that indicates what the defendants were placed under arrest for?

A No, sir.

Q You have worked at the Central Complaint desk; haven't you?

A Yes.

Q And you prepared these forms?

A Yes, sir.

Q Now, when a report comes from the field stating that a person is being held in the ordinary course of

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police procedure don't you ask what the person is being held for?

A No, sir.

Q You don't do that?

THE COURT: Yes or no.

THE WITNESS: No, sir.

MR. KRAE: I have no further questions of this witness.

Q How do you confirm that these were not -- Do you confirm that these actually were not on the air?

A Well, time stamped, and the man signed his number to them.

Q That is all?

A Yes, sir.

Q You have no idea whether they were broadcast or not, do you?

A I have no reason to think they wouldn't be in the usual course of business.

Q Is there any indication on those papers?

A Yes, sir, there is.

Q That it was actually broadcast?

A Yes, sir.

Q Read the information.

A 62 B. From Sergeant number 1 at 9:38; car 66 B.

Q How do you know it was actually broadcast out?

THE COURT: He says there is a memorandum there that indicates that was done.

Q Do you have a statement there by the person broadcasting it that he did so?

A His number on the bottom of the slip, number 22.

Q Just his number; is that it?

A That is all.

Q Nothing more?

A No.

Q How do you confirm that Patrolman Obarowski received the call?

A No way of confirming that.

Q No way at all?

THE COURT: Excluded as argumentative.

Q When for the first time did you hear from Patrolman Obarowski?

A This morning.

Q I am talking about the day of this occurrence, sir? Do you have a slip there in any one of those?

A Car 62, sergeant's number 2 in car 62 B went West 8th Street and Avenue U, holding occupants of 6 Z 7154.

THE COURT: Is B the car that the witness and the sergeant were in?

THE WITNESS: Yes, sir.

Q That is the first confirmation you got, but there is no confirmation that the patrolman received the alarm; is that correct?

THE COURT: We have been over that. It has already been answered.

MR. KRANZ: May I ask on the number of the radio car?

Q What was the number of the radio car that was at the scene?

A At West 8th and Avenue U 62 sergeant number 2 and 62 B.

Q What is the number of the car?

A I don't have that.

Q It doesn't have the number of the radio car there?

A No, sir.

THE COURT: Step down.

Anything else?

MRS. PRINCE: Nothing further.

MRS. PRINCE: People rest.

MR. KRANZ: Defendants rest.

THE COURT: The matter is with the defendants now.

MR. KRANZ: As to defendant Mungo, defendant rests.

MR. COVEN: Defendants D'Amore and Johnson rest.

THE COURT: Both sides now rest. We will take a recess for about 15 minutes. I will then be prepared to render a decision in this case. Everybody be assembled please at a quarter to one.

(A recess was then taken until a quarter to one-o'clock, at which time the case was recalled.)

THE COURT: Both sides having rested the following constitutes the Court's decision:

[Upon all the evidence adduced before me I find and decide that, based on the information he had, that is, the description of the car, the number of its occupants and the other related matters pertaining to the crime under investigation, the police officer had ample probable cause to believe that a felony had been committed and that the defendants had committed it. Their arrest was, therefore, justified under Section 177 of the Code of Criminal Procedure.

I hold, as a matter of law and fact, that this arrest was made at the scene (see *Lovelace v. the United States* 357 Fed 2nd 306).

The search which followed, or was simultaneous with this lawful arrest was likewise lawful, as incidental thereto, and this applies to the continuing search at the station house. I predicate my decision upon the following cases: People v. Horovitz, 25 A.D. 2d 367, People v. Koposkeski 25 A.D. 2d 777, Brinegar v. the United States 338 U.S. 160, and Draper v. U.S. 358 U.S. 307.

The motion is denied as to each of the defendants, and as to both indictments. Submit order.

Bail continued.

MR. KRANZ: Exception.

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Minutes of Pre-Trial Hearing
on Identification
(11/20/67)

SUPREME COURT : KINGS COUNTY

CRIMINAL TERM : PART VI

----- X

THE PEOPLE OF THE STATE OF NEW YORK

against

THOMAS MUNGO and ROBERT D'AMBRA,

Defendants

----- X

(Ind. 1096/67)

Brooklyn, N. Y.

11/20/67

Before:

Hon. John R. Starkey,
Justice

Appearances:

Angelo Barra, Esq., ADA
For the People

B. Coven, Esq.
For Defendant D'Ambra

F. D. Kranz, Esq.
For Defendant Mungo

Sanford Aronow, CSR
Official Reporter

THE COURT: Gentlemen, we have four jurors
sworn, but I have directed that they be kept out-

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side of the jury room. Do you want to proceed with the identification hearing now before we proceed with the selection of the jury?

MR. COVEN: Yes, sir.

MR. KRANZ: We have no objection, your Honor.

MR. BARRA: If the Court pleases, may I ask that the witness who is about to take the stand not give his address in open court and write it down on a piece of paper for the Court?

THE COURT: Write down what?

MR. BARRA: Write down his address and not out loud, sir.

THE COURT: You have no objection to that?

MR. COVEN: I have no objection.

MR. KRANZ: No objection.

LEONARD MONTELEONE, being first duly sworn, testified as follows:

MR. BARRA: May I ask that all witnesses be excluded for the purpose of this hearing, your Honor?

MR. KRANZ: I would join in that application, your Honor.

MR. COVEN: No objection.

THE COURT: Very well. All witnesses in this matter will remain outside until called; both sides.

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MR. COVEN: There are no witnesses here.

THE COURT: Gentlemen, Mr. Katz, who was sworn as a juror, has reported to the Court officer that he is ill. Is it agreeable if we excuse him and select another juror?

MR. BARRA: Yes, sir.

MR. COVEN: Yes, sir. In that event, may we have an additional peremptory challenge?

THE COURT: Yes.

MR. COVEN: Thank you.

MR. KRANZ: I would then agree to excuse the juror.

THE COURT: If you want, I'll have him brought into the courtroom.

MR. COVEN: Just as long as we have that additional challenge, that's all.

THE COURT: Is that agreeable?

THE COURT: That's all right.

THE COURT: That will apply to you, Mr. Barra.

Everybody gets an additional challenge.

DIRECT EXAMINATION BY MR. BARRA:

Q Mr. Monteleone, on January 3, 1967, you were employed by whom? A New York Telephone Co.

Q On that day --

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THE COURT: In what capacity?

THE WITNESS: Telephone and coin collector.

Q Will you tell the Court what your duties entail, as such? A Collect the money from the coin telephones.

THE COURT: Will you speak louder?

Q Now, were you working on January 3, 1967?

A Yes.

Q What time did you start work that day?

A Nine a.m.

Q During the course of your day, at or about 2:30 p.m. did you have occasion to be at premises 1301 Gravesend and Neck Road? A Yes.

Q What did you do when you went to those premises, Mr. Monteleone? A I removed the coin receptacles from the pay telephones.

Q And what happened then after you removed the receptacles?

BY THE COURT:

Q You were in there. You removed the coins from the coin receptacle. What if anything happened?

A I was approached by a man, who told me to get into the -- "Don't say anything. Get into the truck."

Q That's outside the premises? A Yes.

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Q What happened then? A I went to the truck and opened the door and I got into it.

Q Go ahead. A And the man told me to get into the back of the truck and lie down. Then another fellow came into the truck and asked me for the keys, the ignition keys, and proceeded to drive the truck away. And the truck --

Q Was it your truck? A The telephone company truck, yes. Then the truck was driven for about four or five minutes. Then it stopped and I heard the cannisters with money in it being removed from the truck -- from the tub that the cannisters were in. As they left, the door was shut. I untied myself and I went to the nearest phone and phoned the police and my company, the telephone company.

BY MR. BARRA:

Q Now, Mr. Monteleone, when you started out that day -- I withdraw the question. You say you have to open up these instruments to take the cannisters from them?

A Yes.

Q And in doing that, do you need a key? A Yes.

Q Where do you get these keys from? A The garage; the telephone company garage.

Q Do you get a number of keys when you start off in the morning? A Yes.

Q Did you sign for those keys -- A Yes, I did.

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Q -- that morning? A Yes.

Q Mr. Monteleone, do you see those two men in the courtroom today?

MR. COVEN: Objection -- I withdraw my objection.

A I'm not sure.

Q All right. Now, Mr. Monteleone, after this incident, did you have occasion to go to the police headquarters in Manhattan? A Yes, I did.

Q And while you were at the police headquarters, did you come in contact with what is called an artist; a police artist? A Yes.

Q And when you came in contact with this police artist, what did you say? What did you do, Mr. Monteleone? A I gave him a description of the fellow who held me up; one of the fellows that held me up.

Q And did anybody prompt you to do this? A No.

Q MR. COVEN: I object to this form of questioning. He is a state's witness. I think he is bound by the answer.

THE COURT: Well, in view of what this witness has said, that he is not sure that the two men or either or one of them were in court -- that is your testimony, is that right?

THE WITNESS: Yes, sir.

BY THE COURT:

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Q I want to find out, have you seen these two defendants before? A Yes, I have.

Q Have you identified them at any place --

A Yes.

Q -- as the men -- A Yes.

Q Now you say you are not sure; is that right?

A Yes.

Q When you did see them on other occasions you were sure; is that right? A Yes.

Q What made you change your mind? A Well, it has been quite a while since it happened, and I can't say for sure -- I can't say any more than it is them.

Q Well, at the time that you did identify them, were you sure? A Yes.

Q Now, if these two men sitting here, these two defendants, are the same two that you identified on another occasion -- you were sure at that time? A Yes.

Q Is that right? A Yes.

Q When and where did you identify these two defendants as having been the two men that held you up?

MR. COVEN: I object to your Honor's --

THE COURT: Objection is overruled.

A I identified them at the 62 Precinct and at the hearing and at the Grand Jury.

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BY MR. BARRA:

Q And were you positive at that time, Mr. Monteleone, at the precinct? A Yes.

Q At the hearing? A Yes.

Q And in the Grand Jury? A Yes, I was.

MR. BARRA: I have no further questions.

CROSS-EXAMINATION BY MR. KRANZ:

Q Now, Mr. Monteleone, on June 3rd --

MR. BARRA: January 3rd.

Q -- you say you called the police? A Yes.

Q January 3rd you called the police? A Yes.

Q And after calling the police, did you have any conversation with any policeman? A Yes.

Q Where and when? A Around three o'clock; a lot of policemen; a lot of detectives asked me a lot of questions pertaining to identification, clothes and when and where.

Q Do you remember which policeman you spoke to? Or a lot of policemen? A Well, a lot of policemen.

Q And do you recall the name of the policeman that you gave the description to? A Detective Guiney.

Q Detective Guiney was the man you gave the description to? A One of the men I gave the description to.

Q Do you recall what the description was that

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you gave? A Yes.

Q What was the description you gave? A One male Negro; tan coat; about six feet; 180 pounds; a black state trooper hat, with fur on it. And the other was a white male, I believe around five-ten, 160 pounds, 170 pounds; dark rimmed glasses; gray fedora hat; gray coat.

Q Now, that was on January 3rd you had this conversation with Guiney; is that right? A Yes.

Q And you are absolutely sure that's the description you gave on January 3rd? A Well, I am pretty sure. It has been eleven months.

Q Now, the next time -- did there come a time after January 3rd, Mr. Monteleone, when you saw Detective Guiney? A Yes.

Q When did you see Detective Guiney, and where?

A On January 4th.

Q And on January 4th, where did you see Mr. Guiney? Or Detective Guiney? A At the 62 Precinct.

Q And that was January 4th? A Yes.

Q Did you have a conversation with him at that time? A Yes.

Q What did he say to you and what did you say to him? A Well, he said to me, "We are going to go over to the scene of the crime."

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Q And did you go to the scene of the crime with him? A Yes.

Q And what happened then? A We tried to -- we reconstructed what happened.

Q You say you "reconstructed". You mean you showed him what happened with reference to the truck and yourself? A Right.

Q How much time did you spend with him? A Fifteen minutes.

Q And then what happened? A Then I went to the police artist in Manhattan.

Q And at the police artist's, what did you do there? A I gave the artist a description of one of the white -- the white fellow who held me up.

Q How about the Negro? A No, I didn't.

Q You didn't give him a description of him?

A No.

Q In other words, the artist didn't draw a picture of the Negro defendant; is that right? A That's correct.

Q Because you didn't give him a description?

A That's correct.

Q Now, did he ask you for one? A I don't recall.

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Q Did he ask you for it and did you tell him that you don't remember clearly the identify of the Negro; is that right?

MR. BARRA: I object.

THE COURT: Overruled.

A I don't recall.

Q Could you have said that? A I don't know what I could have said.

MR. BARRA: Objection to that; "Could you".

THE COURT: Sustained.

Q Well, at the time you went to the artist, which was a day later, you weren't sure of the description of the Negro defendant, were you? A No, I guess I wasn't.

Q You weren't sure. And that was a day after the event; isn't that right? A Yes.

Q Now, in fact, Mr. Guiney --

THE COURT: This is Mr. Monteleone.

Q Mr. Monteleone -- withdrawn. Now, or January 3rd, when you opened the door of the truck, you had your back toward that particular participant; isn't that right? A No.

Q Where did this -- where was the truck parked?

A On Gravesend Neck Road; the corner of Gravesend Neck Road and East 13th Street.

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Q And you say a person came up behind you; is that right? A No.

Q Where did he come from? A Well, as I left the store, the factory, where I was collecting, he was standing by the door, and when I opened the door I hit him with the door, so I said, "Excuse me." And as I walked towards the truck, he came up alongside of me.

Q Now, at no time did you get a front face view of this man, did you? A Well, yes; when I hit him with the door.

Q When you hit him with the door. When you hit him with the door, did he turn? A No.

Q What kind of a door was this? A A door that pushes out.

Q Was it a wooden door? A Wooden door.

Q A wooden door. When you say the door hit him, was the wood of the door obstructing your view?

BY THE COURT:

Q Was it a solid wooden door with glass in it?

A Yes.

BY MR. KRANZ:

Q Was it obstructing your view? A No; no, not from him.

Q And then you said "Excuse me" and kept walking?

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A Yes.

Q How long did that take? A About four or five seconds.

Q And then you say he came up behind you?

A Alongside of me.

Q Alongside of you. And that person said, "Get into the truck"? A Yes.

Q And then you got into the truck? A Yes.

Q Now, at the time that you got into the truck, was your back facing that particular person? A No. He was alongside of me.

Q So were you looking straight ahead? A Yes.

Q You weren't looking at him, were you? A Well, when he came up to me, I looked at him.

Q But then when he said, "Get into the truck", you were looking straight ahead; is that right? A Yes.

Q And then you got into the truck; is that right?

A Yes.

Q And then did you lie face down? A No.

Q Now, how long after you got into the truck did you say the truck was driven away? A About a minute and a half to two minutes.

Q The next time after January 4th did there come a time when you saw Guiney? A Yes; at the hearing;

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preliminary hearing.

Q Pardon? A At the first time I came into court.
date

Q Do you remember the date -- what day that was?

A No.

Q You never testified in Criminal Court, did you?

A Wait; excuse me. The next time I saw Detective Guiney was when I had to sign a complaint and came into court.

Q To sign a complaint? A Yes.

Q Now, do you remember what date that was?

A I believe it was the Monday following the robbery.

Q The Monday following the robbery. A I believe; I'm not sure.

Q You are not sure. Now, prior to the day that you signed the complaint, Mr. Monteleone, did Guiney show you any people? A Yes.

Q And ask you to identify them? A He asked me if I recognized them.

Q When was that? A January 14th.

Q Pardon? A January 14th.

Q And where were those people that he asked you to identify? A 62 Precinct.

Q Now, how did you know to go to the 62nd Precinct? A I received a phone call from Detective Guiney.

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Q What did he say to you? A "I want you to come down and identify" -- "see if you can identify two people for me."

Q Did he say "identify the two people that were involved in the robbery"? A No.

MR. BARRA: Objection, your Honor.

THE COURT: Overruled.

Q What? A No.

Q Did you ask him whom you were supposed to identify? A No. I assumed it pertained to that case; the robbery.

Q But he said he had two people and he wanted you to see if you could identify them; is that right?

A Yes.

Q And did you go to the 62nd Precinct? A Yes, I did.

Q Whom did you go with? A Myself.

Q Pardon? A No one. I went by myself.

Q And when you got to the 62nd Precinct, where in the 62nd Precinct did you go? A To the detective part of it.

Q Detective squadroom? A Yes.

Q When you got to the detective squadroom did you see -- whom did you see them? A Well, I met at

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the time Detective Guiney, and he went in a room to a mirror, and I saw the two defendants standing. Well, there were three people; three people in the lineup.

Q Now, when you got to the detective squadroom, who was in the squadroom? There was Detective Guiney; isn't that right? A Yes.

Q And was there a Negro fellow there? A Yes.

Q And was there a white fellow there? A Yes.

Q And another white fellow? A Yes.

Q Okay. So you saw them in the detective squadroom with Guiney; isn't that right? A No. Well, they weren't together.

Q But you saw them in that room? A Yes. Well, we were in another room.

Q When you saw Guiney for the first time, you saw him in the squadroom; isn't that right? A The first time? When? That day?

Q That day. A Yes.

Q You saw him in the squadroom. And in the squadroom there was a Negro fellow, wasn't there? A No. There's two rooms. I don't know what a squadroom is.

Q Let me put it this way. When you saw Detective Guiney, was he alone or was he with anybody? A Yes; he was by himself.

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Q By himself. What did he say to you? A I want you to identify" -- "see if you can identify someone for me", and we went into this dark room, where there was a two-way mirror.

Q And was there anybody in that room besides you and Guiney? A No.

Q And did he ask you to look through the mirror?
A Yes.

Q Did he stay with you? A Yes.

Q He stayed with you; isn't that right? A Yes.

Q Did he say anything to you? A He said, "Do you" -- "Do you recognize these people?"

Q And you looked through that two-way mirror?
A Yes.

Q Now, what did you see in that two-way mirror?
A The two defendants and another fellow.

Q And what were they doing? A Standing there.

Q They were standing in front of the mirror when you looked in; is that right? A Yes.

Q How many Negroes were there? A One.

Q Just one; is that right? A Yes.

Q And did they have anything on their heads?

A No; not at the beginning.

Q Not at the beginning. But did Guiney say,

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"Well, put on hats"? A I don't recall if he said anything. First they were showed without hats, and then with hats.

Q All right. And isn't it a fact when you first saw them you said you weren't sure? What? Isn't that right? A Yes.

Q And it was only after Guiney's prompting that you said, "All right; these are the fellows"? A No.

Q But you weren't sure when you first looked at them; isn't that right? A Without the hats on.

Q And then they put hats on? A Yes; and glasses.

Q Oh; he put glasses on them too? A On the white fellow; the white fellow.

Q What kind of hats did he put on them? A He put a gray fedora on the white defendant and a black sort of state trooper type hat on the Negro fellow; the Negro defendant.

Q Now, for how long a period of time -- for how long a period of time did you look at these fellows? Five minutes? Ten minutes? How long.

MR. BARRA: I object. Where?

Q Through the mirror. A About two minutes.

Q Now, you say hats were put on them. Guiney

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never left you, did he, to put hats on them? A No.

Q Somebody else was putting hats on them; isn't that right? A Yes.

Q Incidentally, did the police ever show you any photographs prior to the identification? A Yes.

Q They showed you photographs. Where? A At the police lab in New York City; Manhattan.

Q At the police lab or the Bureau of Criminal Identification? A I guess it's that.

Q How long did you look at photographs? A All day.

Q Now, do you remember what day that was?

A No.

Q Was that January 4th, do you know? A I don't remember.

Q Did they ever show you any pictures of these defendants? A No.

Q Was it the same day, the 14th of January -- withdrawn. Did there come a time prior to the time that you signed the complaint in this case that you were asked to describe these defendants in court? A No.

MR. COVEN: Your Honor, may I trouble the Court to read back the question and the answer; the last question and answer?

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THE COURT: Well, I heard it. "Did there come a time when you were asked to identify the defendants in court?" I assume that what Mr. Kranz wants to know is, was it as a result of the identification at the 62nd Precinct that these defendants were arrested? Is that right?

MR. KRANZ: Yes, sir.

MR. COVEN: His answer was, "No".

THE COURT: That's right.

MR. COVEN: He never identified them in court previously.

THE COURT: The only place you identified them was at the 62nd Precinct; is that right?

THE WITNESS: Yes, sir.

BY MR. KRANZ:

Q Were you ever asked to identify them in court?

A Yes.

Q And that was before you signed the complaint?

A No.

Q Now, when you were asked to sign the complaint in this case, didn't you tell Detective Guiney that you didn't want to because you weren't particularly sure that these were the fellows? A No.

Q Didn't you tell him you weren't sure of the

Monteleone - Coven - cross

Negro fellow? A Before he -- before the hat was put on him.

Q You said you weren't sure. A Right.

Q And in fact you are not sure now, isn't that right, as to the Negro fellow? Isn't that right?

A Yes.

MR. KRANZ? I have no further questions of this witness, your Honor.

BY MR. COVEN:

Q When that door of your truck swung open, did it hit the Negro person? A The door of the truck?

Q Yes. A No.

THE COURT: He testified as he was leaving the factory, it was the factory door.

Q Whom did it hit; the Negro? A Yes.

Q Hit the Negro; right? A Yes.

Q So it was the Negro that you got the side view of; right? A No. I got a front view of him.

Q Of the Negro? A Yes.

Q You testified that when you came into the truck, you were ordered by the Negro to lie down; is that correct? A Yes.

Q Did you lie down? A Yes.

Q And --

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THE COURT: Face down or face up?

THE WITNESS: Face down.

Q After you lay down, you then heard some other person come in and rifle your cannisters; is that correct? A No.

Q Did you hear your cannisters being rifled?

A Yes.

Q When for the first time did you sense the presence of a second person other than the Negro?

A Well, to get into the back of the truck, you have to turn sideways; because there is a -- where the cannisters are kept, it is called a tub, and you have to turn sideways to get in the back of the truck. As I turned sideways, I saw this white fellow getting into the truck.

Q Out of the corner of your eye? A No. I turned around.

Q Did you see his side profile? A Face; front.

Q There came a time when you were requested to come down to the police station; is that right? A Yes.

Q Naturally you assumed that it was in connection with this robbery; is that correct? A Yes.

Q When you got down to the police station, did you speak with someone? How did you get down there?

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A I went down by myself.

Q When you got down there, you spoke to someone?

A Yes.

Q What was the name of that person? A Detective Dan Guiney.

Q And naturally, as a result of your curiosity, you asked him what had happened; is that correct?

A Yes.

Q And he told you that he had captured two men; is that correct? A No; he didn't capture them.

Q Well, that he had two men in custody? A Yes. Three men.

Q Did he tell you he had two men or three men?

A Three.

Q In custody? A I don't remember what he said.

Q He had three men. Then there came a time, as I understand it, when you went to look through a two-way mirror; is that correct? A Yes.

Q What was the height of the white men; the two white men? A Both around six feet.

Q Can you recall the color of their hair; of the hair of the two white men? A One was dark hair and the other one had sort of grayish --

Q Their hair was different; is that right?

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A Yes.

Q What other characteristics did you notice was different between the two white persons, if you can recall at this time? Facial? A Well, one was --

Q Fat? A One was heavy and the other one was slim. The heavy one was much older.

Q How much older was the heavy one than the slim one, in your estimation? A Ten years; fifteen years.

Q At least fifteen years older. One white man was fifteen years older than the other? A Ten or fifteen.

Q One had gray hair and the other had black hair? A Yes.

Q Was one wearing glasses at the time? A No.

Q Were any of the white persons wearing glasses?

A No.

Q Now, there came a time, you have told us -- there came a time when somebody put on glasses; is that right? A Yes.

Q One of the white prisoners put on a pair of glasses, and of course the other one remained without glasses; is that right? A I believe so.

Q And there came a time when one of the white persons you identified put on a hat; is that correct?

A Yes.

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Q And of course the other one remained without a hat; is that right? A Yes.

Q Who remained without a hat? The man who was ten or fifteen years older? A Yes.

Q Did you note the type and kind of clothing that was worn by the two white men? Were they different in any way that you can recall? A The two white men?

Q Yes. A Well, the one I never saw before, so I can't say if he had different clothing on.

Q Which one of the white men wore handcuffs? A I don't recall.

Q One of them did? A I don't recall if any wore handcuffs.

MR. BARRA: Will you speak up, please?

Q You don't recall whether any were handcuffed? A No.

Q Could one of them have worn handcuffs? A I don't know.

Q In all honesty, your recollection at this moment is somewhat faulty with respect to an item such as that? A Handcuffs?

MR. BARRA: Objection, your Honor.

Q Would that be correct?

THE COURT: Yes; sustained.

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Q Now, does the fact that the two persons sitting on the table next to my associate, the Negro and this white man, does that help you in recollecting your identification at that time? A Yes.

Q And are you using their presence to refresh your recollection and looking at this time to refresh your recollection as to the persons you believe you identified on the first occasion? A Well, they are the people I identified. Is that what you mean?

MR. COVEN: May I have the question reread, your Honor?

THE COURT: Yes; read it back.

(Read back by the reporter.)

A I still don't understand the question.

MR. COVEN: I withdraw the question. May we strike the answer made to a question he didn't understand?

THE COURT: All right. We'll start all over again.

BY MR. COVEN:

Q Well, just this one question, sir. The presence of these two persons is an aid to you in refreshing your recollection; is that correct? A My recollection of what?

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Q Your recollection of what persons were present on the scene of this robbery on January 3rd?

A Yes. They look familiar.

Q You have seen them before in the courtroom, haven't you? A Yes.

Q You told us some while ago that you may have been or you are doubtful about their identification; is that correct? A Well, they look similar to the people who held me up.

Q But you are not certain of it? A I can't be a hundred per cent sure.

Q Can we say -- can we use the word "doubtful"? A Yes.

MR. COVEN: I have no further questions. Your Honor, just give me one moment.

(Defense counsel conferred.)

BY MR. COVEN:

Q At the time you looked through that two-way mirror, was an Assistant District Attorney present?

A I don't believe so.

Q No one else but the police; is that correct? Or you don't remember? A Well, there were other persons in the squadroom. I don't know who they were.

Q But at the time and place when you looked

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through that mirror -- A Just the detective and myself.

MR. COVEN: No further questions.

REDIRECT EXAMINATION BY MR. BARRA:

Q Mr. Monteleone, after this incident, you said that you went to a police artist in the Police Department; is that correct? A Yes.

Q And you gave him certain information; is that correct? A Yes.

Q And you gave him information concerning what person? Which of the two defendants did you give him information on? A The white defendant; D'Ambra.

Q As a result of what you told him, did the police artist do something? A Yes.

Q What did he do? A He drew a sketch.

Q And was this sketch drawn in your presence, Mr. Monteleone? A Yes, it was.

Q After he completed the sketch, did he show it to you? A Yes.

Q And I now show you a sketch and I ask you, do you recognize that sketch? A Yes, I do.

Q And what is that sketch?

MR. KRANZ: Can we see the sketch, your Honor?

THE COURT: Yes; in a moment.

Q And the person that's represented in that

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sketch, was that pursuant to the information that you had given to the police artist? A Yes.

Q And is that person represented in that photograph, that sketch, is that one of the men that held you up?

MR. COVEN: I object, your Honor. The skill of the artist has not been demonstrated.

BY THE COURT:

Q In response to questions put to you by the artist, did he draw a picture? A Yes, sir.

Q And did he show different types of faces?

A Yes, sir.

Q And he changed here and there pursuant to your suggestion; is that right? A Yes.

Q And this picture that you have in your hand now, is that your ultimate description of one of the robbers?

MR. COVEN: I object to your Honor's questioning, most respectfully.

THE COURT: All right. Your objection is noted and you have an exception.

Q Is that right, after a number of changes?

A Yes. This is the last one.

Q That was the last one, and that picture looks

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most like the robber of any that he drew; is that right?

A Yes, sir.

MR. COVEN: May I ask a question or two on the voir dire?

THE COURT: No; not now. Just wait. You'll have an opportunity.

Q And when was that picture drawn?

MR. BARRA: Mr. Monteleone --

Q Do you know? A January 11th, your Honor.

THE COURT: January 11th.

BY MR. BARRA:

Q Was that photograph -- was that sketch made prior to your viewing the two defendants at the 62nd Precinct, Mr. Monteleone? A Yes.

Q That sketch represents which person? Which of the two that held you up? A The white fellow.

Q And is that white fellow in the courtroom today?

MR. COVEN: I object, your Honor.

THE COURT: Sustained.

Q Mr. Monteleone, does that sketch fairly and accurately represent the person that held you up?

A Yes.

Q One of the persons? A Yes.

MR. COVEN: I object, your Honor.

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THE COURT: Well, I'll sustain it as to form.
It's a fair representation?

THE WITNESS: Yes.

MR. COVEN: I object, your Honor, because the skill of the artist has not been demonstrated. It may be a fair representation of what the artist believes.

THE COURT: Your objection is overruled. This witness, who saw the robbers, says that this picture is a fair representation of the robber, regardless of the artistry.

MR. BARRA: I now offer it into evidence as People's Exhibit 1.

(Handed to defense counsel.)

RECROSS-EXAMINATION BY MR. COVEN:

Q The artist, how many attempts at sketching did he make before he made this? A Well, that's the result of one -- in other words, he starts with one form and he fills it in. I don't know how many erasures he made.

Q I show you this statement here, "Sketch number 3". Would that help? A Apparently, that's the third.

Q This is the third sketch that he made. Had

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you given him any previous identification? Ear marks which were subsequently changed, and which resulted in this third sketch? A Well, he did make certain changes until I got the full picture; what I had in my mind.

MR. COVEN: Your Honor, I respectfully object to the introduction of this piece of evidence as not the best evidence. It is hearsay. No proper foundation has been laid for its introduction. Lastly, I would respectfully request in all events that it be admitted only for the purpose of this hearing, if it is to be admitted over my objection.

THE COURT: That's all we are having now is the hearing. But we do have a case, People against Coffey, 11 N. Y. 2nd 142, wherein the Court said, at page 145: "Ordinarily, of course, the sketch drawn by the police artist from details given by the victim after the crime would be considered hearsay and so could not come into evidence. However, in this instance, it is allowed under the well established exception to the hearsay rule that '... where testimony of a witness is assailed as a recent fabrication, it may be confirmed by proof of declarations of the same tenor before the

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motive to falsify existed';" citing People against Singer.

MR. COVEN: There is no attempt to show fabrication on the part of this witness.

THE COURT: No? What are we having here?

MR. COVEN: Cross-examination does not necessarily indicate a pattern of perjury on the part of the witness.

THE COURT: It isn't a matter of perjury. It is a matter of suggestibility. You are attempting to show by cross-examination -- and if you are not please tell me -- that this identification was made as a result of suggestion by the police. The witness said he wasn't sure of the identification of the two men, and then the police caused hats to be put on them, glasses to be put on them; and as a result of that suggestion, I believe the question is, whether the witness was identifying the hats and the glasses, rather than identifying the perpetrators of the crime against him. Isn't that what you are trying to do by cross-examination?

MR. COVEN: Plus a little bit more.

THE COURT: Go ahead.

MR. COVEN: We are trying to show that he may

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have been mistaken.

THE COURT: Right; and that he wasn't sure, and so the police in effect told him that they were the two men who had perpetrated the robbery. Now, under that circumstances, why, I think that Coffey --

MR. COVEN: I merely --

THE COURT: Will you please? I am talking; -- that Coffee and Singer apply. "The necessary conditions for the use of such supporting evidence were present when the sketch was received. By his cross-examining of the victim and by statements to the Court, defendant's counsel had endeavored to show the jury that the victim's identification of the defendant, the burglary in that case, was a 'recent fabrication', contrived after the defendant was arrested."

I think that's on all fours with what we have here. The defendants were arrested and taken into custody, and the identification was contrived.

MR. COVEN: When was the sketch made?

THE COURT: January 11th, before the arrest of the two defendants, or before the two defendants were taken into custody. I am just reading for you my reason for your objection to the receipt of the

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picture is evidence.

BY MR. COVEN:

Q Did you have this sketch in your hand at the time you looked through that two-way mirror? A No. It was drawn after -- no; excuse me. No, I didn't have the sketch.

Q It was drawn -- the sketch was drawn after you looked through the two-way mirror? A No; before.

MR. COVEN: I have no further questions. May I have an exception noted?

THE COURT: Of course.

MR. BARRA: I now offer it into evidence as People's Exhibit 1.

MR. COVEN: May it be restricted for the purpose of this hearing only?

THE COURT: I am only conducting this hearing now at this time. I don't know what is going to happen during the course of the trial.

(Marked People's Exhibit 1.)

THE COURT ATTENDANT: People's Exhibit 1 in evidence.

BY MR. BARRA:

Q Mr. Monteleone, I ask you to look at People's Exhibit 1. Looking below the picture, do you have a de-

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scription on that? A Yes.

Q And that description that's contained on People's Exhibit 1, were they descriptions that you gave to the Police Department of the City of New York?

A Yes.

MR. COVEN: At this time I object. May I renew a further objection, that if your Honor is to admit that paper, that the admission be restricted to the sketch and not to the statements made in the paper.

MR. BARRA: Your Honor, if I may interrupt. There is an attack on the description of the defendant, your Honor. That's been brought out on cross-examination.

THE COURT: Well, we have testimony that the white man was five feet ten; weighed 160 pounds; was wearing a gray fedora hat and gray coat. The Negro perpetrator wore a tan coat; was six feet in height and weighed 180 pounds, with black straight trooper's hat with fur. Those descriptions were approximate. Now, I don't know that there has been any attack on that description at all, so I am going to sustain the objection. As I recall it, that was elicited on -- was it elicited

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on cross-examination? I think it was on direct examination.

BY MR. BARRA:

Q Now, Mr. Monteleone, when you were there that day and the sketch was made --

THE COURT: That was elicited on cross-examination by Mr. Kranz; that's right.

Q Now, when you were at the police -- at the FBI, did you give any description -- I'm sorry.

BY THE COURT:

Q What did you say to the artist regarding the Negro person?

MR. COVEN: I object to that.

MR. KRANZ: Objection.

THE COURT: Overruled.

MR. KRANZ: If I may just be heard for one minute, please.

THE COURT: No; overruled.

MR. KRANZ: Exception.

I
A I don't believe/said anything.

BY MR. BARRA:

Q Well, you were there to give -- to have a sketch made up; is that correct, Mr. Monteleone? A Yes.

Q And you had one made up regarding the white? --

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A Yes.

Q -- the white person; is that correct? A Yes.

Q Did you have a conversation with the artist regarding a sketch concerning the Negro person?

MR. KRANZ: I object to that, your Honor; already been asked and answered.

THE COURT: On cross-examination. Now this is redirect examination. I have on cross-examination that he was not sure of the description of the Negro. Now we can have a redirect on that.

MR. KRANZ: He is in effect attempting to impeach his own witness, your Honor.

THE COURT: Overruled. Please sit down. You have an exception.

BY MR. BARRA:

Q What did you say to the artist regarding the Negro?

A I don't believe I said anything.

Q Were you able to -- were you able to give him certain information so that he could prepare a sketch?

MR. KRANZ: I object.

THE COURT: Sustained as to form.

BY THE COURT:

Q Look. You went to the artist. You were asked if you could describe either or both of the defendants

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for the artist; is that right? A Yes.

Q And you did give a description of the white robber. And the forehead was a little high; a little too low; or a little too narrow; is that the procedure?

A Yes.

Q The nose was longer or shorter. It was wider; or thinner; is that right? A Yes, sir.

Q The chin and the mouth were changed; is that right? A Yes.

Q Now, and as a result he came up with this picture, People's Exhibit 1. Now, did the artist say anything to you about the Negro? Did he ask you if you could describe the Negro? "Was he light? Was he dark? What shade of Negro he was? A Yes. Well, all I could say was that he was dark. I couldn't give any facial features at all.

Q So that you were unable to describe the Negro to the extent that he could make a drawing; is that right? A Yes.

BY MR. BARRA:

Q Mr. Monteleone, did you tell the police artist that if you saw the defendant you would recognize him?

MR. COVEN: I object to the form of the question, your Honor.

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THE COURT: Sustained.

Q Mr. Monteleone, you say that when you looked through the mirror at the 62nd Precinct, there were three men; is that correct? A Yes.

Q When you looked through the two-way mirror?

A Yes.

Q Two of which you identified; is that correct?

A Yes.

Q And they were the two men that held you up? The two that you looked through the mirror at? A Yes.

Q And did you find out their names to be D'Ambra and Mungo? A Yes.

Q Mungo is whom? A The Negro.

Q D'Ambra is whom? A The white fellow.

Q You looked through that mirror and you saw D'Ambra and you saw Mungo. Were you positive that those were the men who held you up?

MR. COVEN: Objection.

MR. KRANZ: Objection.

THE COURT: Overruled.

MR. COVEN: Calls for a conclusion of his mind.

THE COURT: At the time.

A Yes, I was.

Q Now, Mr. Monteleone, some time thereafter, do

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you recall going to the Criminal Court? A Yes.

Q And do you recall a hearing being held? A Yes.

Q And when that hearing was being held, did you see the defendants, Mungo and D'Ambra? A Yes.

Q Did you at that hearing identify the defendants, Mungo and D'Ambra? A Yes.

Q And did you also at that hearing describe in detail as to what Mungo did and as to what D'Ambra did?

MR. COVEN: I object to that.

MR. KRANZ: Objection.

THE COURT: Sustained.

Q Were you positive in the Criminal Court at the hearing that Mungo and D'Ambra, the two people you saw at that hearing, were the same two people that you viewed through a mirror and also the same two people that held you up on January 3, 1967?

MR. COVEN: Objection.

MR. KRANZ: I object.

THE COURT: Overruled.

A Yes.

MR. COVEN: While he is conferring with his client, Judge, may we reverse the order at the moment?

THE COURT: Surely.

BY MR. COVEN:

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Q Mr. Monteleone --

MR. BARRA: Will you just thold it a minute,
your Honor?

(Mr. Barra conferred with the county detective.)

BY MR. BARRA:

Q Now, Mr. Monteleone, the two men that you
identified at the hearing, are they the same two men
sitting in this courtroom today? A Yes.

BY MR. COVEN:

Q Mr. Monteleone, you are of Italian extraction;
is that right?

MR. BARRA: Objection, your Honor.

MR. COVEN: I have --

MR. BARRA: Objection, your Honor; about
"Italian extraction".

MR. COVEN: He is asked a question which I
have to lay a foundation for, your Honor.

THE COURT: Overruled.

Q You are of Italian extraction? A Yes.

Q You are familiar with the name "D'Ambra" as
being of Italian origin; is that correct? A Yes.

Q When you went to that police station, were you
told that one of the men's names was D'Ambra? A No.

Q When for the first time did you learn of those

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names? A After I identified them.

Q That day? Right? A Yes.

Q At that time; correct? A After I identified them; right.

Q The moment after you identified them? A It could have been five minutes. It could have been ten minutes.

Q It could have been five seconds; right?

A No.

Q Could have been a minute; is that right?

A Possibly.

Q You were told that one of them was named D'Ambra and the other Mungo; correct? A I asked what their names were.

Q In your experience, have you found it rare to find a Negro with an Italian name?

MR. BARRA: Objection, your Honor.

THE COURT: Sustained.

MR. COVEN: No further questions.

THE COURT: All right. Step down.

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Decision of District Court
(372 F Supp 742)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA
ex rel. THOMAS MUNGO

v.

J.E. LaVALLEE, SUPERINTENDENT
OF CLINTON CORRECTIONAL FACILITY,
BOX B, DANNEMORA, N.Y. 12929

:
:
73-C-395

:
MEMORANDUM
and
ORDER

:
: MAR 20 1974

-----X
Submitted:

McCarthy & Dorfman, Esqs., by David W. McCarthy, Esq., 1527
Franklin Avenue, Mineola, New York, for relator

Hon. Louis J. Lefkowitz, Attorney General, State of New York,
by Burton Herman, Ass't Attorney General, for respondent

COSTANTINO, D.J.

Thomas Mungo, presently confined at Clinton Correctional Facility, moves for a writ of habeas corpus under 28 U.S.C. § 2254 (1971), attacking a conviction for robbery, grand larceny and assault following a jury trial in Supreme Court, Kings County. Specifically he claims that the trial judge committed error by admitting testimony of an out-of-court identification which was the product of an impermissibly suggestive confrontation and by admitting into evidence items illegally seized from his automobile at the time of his arrest.

Prior to trial, relator was afforded a full evidentiary hearing on his motion to suppress the identification testimony and the items seized from the automobile. The facts adduced at the hearing can be summarized as follows. On January 3, 1967 Leonard Monteleone, then an employee of the New York Telephone Company, was collecting coins from pay telephones. At about 2:30 p.m. he proceeded to a factory located at 1301 Gravesend Road, Brooklyn, New York. Upon leaving the factory with two coin cannisters he pushed a door against a man standing outside, whereupon he turned to the individual and excused himself. Before he reached his vehicle he observed that same person - later identified as Thomas Mungo - come up to his right and he felt something hard being placed into his side. He was told, "Don't say anything. Get into the truck." While entering the rear of the truck Monteleone turned his head and observed a second man follow behind him - this man was later identified as Robert D'Ambra. After being asked for his keys, he was bound by tape and made to lie face down on the floor of the truck. The vehicle was then driven away and shortly thereafter several coin cannisters were

removed.

At the hearing Monteleone testified that he was able to see the face of each of the assailants for a few seconds. Moreover, on the day of the robbery he was able to give to the police a description of the clothing worn by the robbers, their race, approximate age and build. The following day he was able to assist a police artist in constructing a fairly accurate portrait of D'Ambra. He was unable to describe Mungo's facial characteristics, although he later testified that at the time he had a "picture of him in his mind."

Eleven days after the robbery Monteleone was summoned to the 62nd Precinct in Brooklyn "to see if he could identify two people." At the stationhouse he was requested to observe three men in a line-up - two of whom were white, D'Ambra and another man much heavier and older than him, and Mungo who was black. Initially Monteleone stated that though two of the men resembled the robbers he could not definitely identify them. The police then placed hats and other apparel on D'Ambra and Mungo. It is significant that the hats and apparel were similar to

those which Monteleone had previously described as being worn by the robbers. An identification of Mungo and D'Ambra was then made. On later occasions Monteleone was unable to make a positive identification of either man. At both the hearing and trial he maintained that when he identified them he was certain that they were the men who had robbed him, but that since he had seen them several times thereafter he could no longer make an identification on the basis of his observations of January 3, 1967.

Minutes after the robbery Patrolman Edward Obarowski heard a bulletin over his police-car radio announcing that "in connection with a high-jacking of a United Parcel Service truck in the 66th Precinct, the perpetrators (three men) were supposedly leaving the scene in a 1966 Plymouth, color blue, registration 6Z 7514." The broadcast also reported that the truck had been left near 71st Street and Fort Hamilton Parkway. Shortly thereafter the patrolman observed a blue Plymouth sedan with three men inside and which bore the license plate numbers given in the bulletin. He pursued the vehicle and while it was stopped for a traffic light ordered the occupants out of the car. All three occupants were placed under arrest and

a search was conducted of their persons and the automobile. Under the front seat of the car the patrolman found weapons and hats which corresponded to those described by Monteleone and which were subsequently admitted into evidence against the defendants.

At the conclusion of the hearing the trial court denied the motions to suppress the identification testimony and the items seized by the arresting officer. Essentially the court held that despite the suggestiveness of the pretrial line-up, Monteleone's identification was reliable. The court's ruling was based upon Monteleone's opportunity to observe his assailants, the short interval between the robbery and the confrontation, the certainty expressed by the witness at that time, and the reasonably accurate description of the robbers given to the police - especially the police artist's drawing. The court made particular reference to the witness' honesty in admitting that after eleven months and after having seen the defendant on several occasions he could not be sure of his identification. With respect to the weapons and other items taken from the automobile, the court held that their seizure was incident

to a lawful arrest. The court found that the arresting officer had sufficient information to give rise to a reasonable belief that the occupants of the car had committed a felony and were in flight, which thereby justified the arrests and search of the vehicle.

Since the out-of-court identification occurred prior to the rulings in Gilbert v. California, 388 U.S. 263 (1967) and United States v. Wade, 388 U.S. 218 (1967), relator's due process claim is to be determined in accordance with the principles established in Stovall v. Denno, 388 U.S. 293 (1967) and its progeny. In Neil v. Biggers, 409 U.S. 188 (1972) the Supreme Court restated the governing test as follows:

It is, first of all, apparent that the primary evil to be avoided is a "very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S., at 384. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification

which violates a defendant's
right to due process. . . .

Id. at 198. The Court further held that mere proof of unnecessary suggestiveness did not require exclusion of evidence of an out-of-court identification. Rather the pivotal question to be resolved is

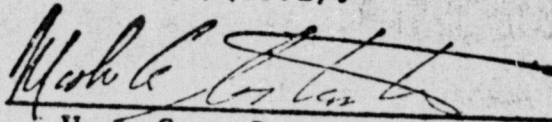
whether under the "totality of the circumstances" the identification was reliable even though the confrontation procedure was suggestive. . . . [T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 199. The record amply supports the state court's finding that the out-of-court identification was reliable. The witness clearly had a basis of recognition independent of the tainted confrontation. Neil v. Biggers, supra; United States ex rel. Phipps v. Follette, 428 F.2d 912 (2d Cir. 1970).

Turning to relator's claim that he was unlawfully

arrested, the evidence proffered before the trial court supports its finding that the arresting officer had probable cause to believe that the occupants of the blue sedan had committed a felony. The events leading up to the arrest occurred within a short time of the robbery. The report that the perpetrators were fleeing in a blue sedan bearing a given license plate number was evidently made by a witness at the scene of the crime. When Patrolman Obarowski observed a car fitting that description immediate action was necessary. In such exigent circumstances the arrests were proper. Chambers v. Maroney, 399 U.S. 42 (1970); Warden v. Hayden, 387 U.S. 294 (1967); United States v. Wabnik, 444 F.2d 203 (2d Cir. 1971). Moreover, the same circumstances which justified the arrests also furnished probable cause for the search of the automobile, Chambers v. Maroney, supra at 46-47; or in the alternative the search was valid as an incident to the lawful arrest. Chambers v. Maroney, supra.

Accordingly, the application for a writ of habeas corpus is denied. 28 U.S.C. § 2254(d) (1971).


U. S. D. J.